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Supreme Court, U.S.
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No. 97-42

In the Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,
PETITIONER,

v.

SHIRLEY S. CHATER,
COMM'R OF SOCIAL SECURITY, *et al.*,
RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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Introduction

Respondents' briefs rest on the mistaken premise that the First Circuit's decision here is simply another in the long "series of unanimous appellate decisions rejecting challenges to the constitutionality" of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 ("Coal Act"). Fed. Br. 9-10; *see* UMWA Br. at 18-19.[1] The constitutional significance of this case, however, derives from unique circumstances that sharply distinguish Eastern from other coal operators whose efforts to avoid liability have been rejected by the courts. By failing to engage the critical distinctions between Eastern and other companies which have challenged the Coal Act, Respondents diminish the standards for review of economic legislation fashioned by this Court. While certainly deferential, this Court has never adopted the apparent view of Respondents that fundamental unfairness in economic legislation is no more amenable to judicial review than are political questions. Rather, this Court has assiduously reserved for appropriate future cases the delicate task of shaping the boundaries of legislative authority in the economic realm. For the reasons set forth below and in Eastern's Petition, this Court should grant certiorari to review the Coal Act as applied to Eastern.

Argument

I. DUE PROCESS ANALYSIS.

As described in Eastern's Petition, this case presents the Court with an opportunity to determine whether retroactive cost-spreading legislation violates the Due Process Clause of the Fifth Amendment as applied to a party whose conduct did not cause the economic burden the statute was

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[1] Petitioner's Sup. Ct. R. 29.6 disclosure is provided at Pet. ii.

designed to address. This question arises from the admonition in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976) that retroactive legislation that lacks a causal connection to the cost to be spread "would present difficulties not encountered" where such a connection exists. The retroactive black lung legislation in *Turner Elkhorn* was constitutional because it "serve[d] to spread costs in a rational manner—by allocating to the operator an actual cost of his business." *Id.* at 24-25. The Court noted, however, that ". . . damages resulting from a miner's death unrelated to the operator's conduct . . . can hardly be termed a 'cost', of the operator's business." *Id.* at 25.

Instead of addressing the limits of due process reserved in *Turner Elkhorn*, Respondents dwell on the similarities between Eastern and other members of the coal industry whose challenges have been rejected by the courts. In particular, Respondents emphasize that Eastern was a member of the coal industry prior to 1965 and is a former employer (typically along with a number of other companies) of the miners assigned to it under the Coal Act. *See* Fed. Br. 15. While that is so, Eastern's contractual obligation prior to 1965 was to a multiemployer plan which undertook to provide benefits to all eligible coal miners. The NBCWAs signed by Eastern attached no significance to the employment relationship between a coal operator and any individual employees. Nor were Eastern's contributions to the UMWA plans made in the name of particular employees, or calculated in relation to the number of miners employed by Eastern. While Congress elected decades later to administer the Coal Act through individual miner assignments to former employers, the proper focus under *Turner Elkhorn* is the lack of connection between Eastern's participation in the coal industry until 1965 and the financial crisis which prompted the enactment of the Coal Act.

The Respondents do not even suggest that the employment of miners by Eastern contributed to the financial crisis which arose years after Eastern's departure from the industry. Indeed, Respondents concede that the financial crisis that led to the passage of the Coal Act resulted principally from the absence of contributions to the UMWA funds in the 1970s and 1980s from companies that either left the coal business or became non-union operators. Fed. Br. 4; UMWA Br. 9. Unlike these companies, Eastern assured a seamless continuation of support for the UMWA plans by transferring its entire coal operation to a fully capitalized successor which was obligated to and did continue to make all required contributions to the plans.[2] *Contrast*, *Blue Diamond Coal Co. v. Secretary of Health and Human Services (In re Blue Diamond Coal Co.)*, 79 F.3d 516, 520 (6th Cir. 1996) ("In 1964, Blue Diamond stopped employing union miners and terminated its obligations to the UMWA fund"), *cert. denied*, 117 S. Ct. 682 (1997); *Dawon, Inc. v. Shalala*, 75 F.3d 1114, 1125 (7th Cir.) ("[The plaintiffs'] withdrawal from participation in the trusts helped create the financial crisis that resulted in the Coal Act."), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 490 (2d Cir.) ("By . . . 'orphaning' its retirees . . ., LTV became a prime contributor

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[2] In a futile effort to undermine the uniqueness of Eastern's situation, the UMWA states that "[m]any other companies subject to liability under the Coal Act . . . did not 'dump' beneficiaries into the UMWA Trusts . . . ." UMWA Br. 19. This reference is to companies which "continued making contributions to the UMWA Trusts through February 1, 1993." *Id.* These companies are the true beneficiaries of the Coal Act—1988 NBCWA signatories which, like EACC, saved millions of dollars a year in reduced UMWA retiree benefit costs. The attempt to compare Eastern, which as been saddled with approximately $100 million in unexpected Coal Act liability, with the post-1988 signatories is therefore fatuous. Not surprisingly, none of these companies has challenged the constitutionality of the benefits granted to them under the Coal Act.

to the financial crisis in the Benefit Trusts.."), *cert. denied*, 116 S. Ct. 298 (1995). Moreover, since the UMWA plans operated on a fully-funded "pay as you go" basis (at the insistence of the UMWA), Pet. at 4 n.3, the plans were fully-funded at the time of Eastern's departure in 1965.

It is true, as Respondents note, that the First Circuit concluded that Eastern's participation in the UMWA plans implicitly contributed to the miners' expectation of lifetime health benefits. *See* Pet. Br. A-13. Whatever implicit contribution Eastern may have made to an expectation of lifetime benefits prior to 1965, however, has no bearing on the inability of the UMWA funds to meet their obligations in the 1990s or the perceived necessity for legislative relief. It was not the implicit creation of expectations of lifetime benefits by Eastern or anything related to these expectations that led to the financial crisis in the UMWA funds. That crisis, rather, was caused primarily by withdrawing employers "dumping" their employees into the pool of eligible beneficiaries without ensuring continued contributions—something that Eastern never did.[3] The same can be said of the allegation that Eastern "profited" from the "labor peace" and other advantages supposedly accruing to Eastern based on its participation in the UMWA benefit plans. Simply put, none of this has anything to do with the financial crisis in the UMWA funds. Congress enacted the Coal Act because the funds were running out of money; the

[3] As Eastern noted in its Petition, neither the Government nor the UMWA submitted affidavits or sought discovery concerning EACC's succession to Eastern's coal-related assets and liabilities. Pet. 6 n.4. In its Brief in Opposition, Peabody attempts to contest certain facts related to that issue. Peabody Br. 2-9. Neither court below, however, addressed these apparent factual disputes, nor did either decide whether Peabody has standing to raise them in this action.

existence of labor peace did not contribute in any way to the financial crisis in the funds.

In addition, it goes without saying that any employer benefits from its employees' labor. And, of course, Eastern paid for that labor both through wages and through contributions to the UMWA funds; the miners therefore "profited" from their labor as well. But if the mere fact that an employee worked at some point for an employer is sufficient to sustain retroactive legislation against a due process challenge, then there is literally no limit to the obligations that could be retroactively imposed on employers for the benefit of employees, however short the employees' employment may have been, however long ago it may have terminated, and however unrelated the employer is to the need for the legislation.[4] As *Turner Elkhorn* makes clear, that is not the law.

[4] Peabody and the UMWA both note that from the 1966 to 1987 Eastern received dividends from its wholly-owned subsidiary, EACC. Fed. Br. 15; Peabody Br. 5. Peabody argues that the receipt of these funds links Eastern to the coal industry and somehow provides justification for Eastern's Coal Act liability. Peabody Br. 5-6. This observation ignores the central fact that EACC's dividend payments in no way contributed to the UMWA funds' financial crisis. In fact, between 1966 and 1987 EACC contributed over $233 million to the fund—a substantial portion of which Eastern presumably could have taken as further dividends had it abandoned its retirees and set up a non-UMWA subsidiary as its Coal Division's successor. JA 2626. Moreover, the dividends derived from EACC were simply consideration for the transfer of an enormous quantity of coal-related assets that took place when EACC was created, a transfer for which Eastern received only stock at the time. And as for the notion that Eastern's status as a parent justifies imputing EACC's actions to it, the short and sufficient answer is that no party in this case has alleged that the corporate veil between EACC and Eastern should be pierced, nor has Congress seen fit to do so statutorily. Under ordinary corporate law principles, then, EACC and Eastern must be treated as the distinct corporate entities that they were between 1966 and 1987.

Finally, Respondents claim that Eastern's Coal Act liability is constitutional because Eastern "directly contributed to the Combined Fund's liability by providing service credits to [its] former employees . . . ." Fed. Br. 14 (internal quotations omitted); *see also* UMWA Br. 14. Relying on *Concrete Pipe,* Respondents contend that these service credits created an entitlement to future benefits, and "[i]t was therefore proper for Congress to require all the coal operators who had contributed to the liabilities of the benefit funds to pay some of the cost of restoring the financial stability of the health care system." Fed. Br. 15. In *Concrete Pipe*, however, the pension plan guaranteed eligibility for a predetermined level of vested benefits, and the departure of the employer indeed contributed to the plan's future liability. *See Concrete Pipe & Products of Calif., Inc. v. Construction Laborers Pension Trust for Southern Calif.*, 508 U.S. 602, 637-38 (1993). But the concept of "vested benefits" and "unfunded liabilities," perfectly sensible in a case like *Concrete Pipe*, has no application to the UMWA funds during all the years that Eastern contributed to those funds for the simple reason that the two crucial elements of the "unfunded liabilities" concept in *Concrete Pipe*—predefined benefit levels and the possibility of vesting—were absent from the UMWA funds until 1974 at the earliest.

Despite repeated efforts to equate the Coal Act, as applied to Eastern, to the statutes in *Concrete Pipe* and *Turner Elkhorn*, the liability imposed by those statutes is fundamentally different, because in those cases the liability arose as a consequence of burdened party's conduct. *See id.* at 641. It is the absence of any such causal conduct by Eastern in engendering the funding crisis that led to the enactment of the Coal Act that raises serious doubt regarding

the application of the Coal Act to Eastern.[5]

II. TAKINGS ANALYSIS.

The thrust of Eastern's Takings Clause argument is twofold: (1) no "proportionality" can possibly exist between Eastern and its liability under the Coal Act where Eastern had nothing to do with the financial crisis that engendered that Act; and (2) the Coal Act's irrational assignment of liability to Eastern was unforeseeable and therefore interfered with Eastern's reasonable investment-backed expectations. The first point has been addressed above in connection with the due process issues. Respondents distort the second point beyond recognition by taking the view that if *some* federal involvement in the coal industry was foreseeable, then *no* federal involvement of any nature can possibly constitute a

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[5] The Respondents make two other arguments in support of the rationality of Eastern's Coal Act liability that are easily dispatched. Contrary to the Respondents' arguments, if Eastern's challenge to its Coal Act liability is successful, the responsibility for paying for the beneficiaries will not automatically shift to EACC, UMWA Br. 24; Peabody Br. 13, or "to other operators who had never employed those miners." Fed. Br. 17. Eastern's beneficiaries would be assigned in accordance with the terms of the Coal Act, and if none of Eastern's beneficiaries worked for EACC, UMWA Br. 15, then the reassignments will not have an impact on EACC. The miners will go to other signatory operators, their successors or will be designated as "unassigned beneficiaries." UMWA Br. 12 n .9. And, as noted by the UMWA, no assigned operator has had to pay an unassigned beneficiaries premium. *Id.* at 13-14. Furthermore, respondents wrongly state that the Coal Act takes account of differences in responsibility for the fiscal crisis by ensuring that companies like Eastern will never be assigned a retiree if a 1978 (or more recent) NBCWA signatory which employed retiree still exists. *See* Fed. Br. 16-17; UMWA Br. 22. For example if a retiree worked one day in 1968 for Company A, a currently active, pre-1978 signatory operator, for 22 months in 1966 and 1967 for Company B, a currently active post-1988 signatory operator, and twenty-two months and one day for Eastern in 1964 and 1965, the Coal Act dictates that Eastern be assigned responsibility for the retiree's health benefits. *See* JA 1581-82 (SSA Pub. No. 68-0101402—interpreting the Coal Act's priority rules.)

taking, thus effectively writing this prong of Takings Clause analysis out of existence.

In the Government's view, once *some* federal involvement in an industry is foreseeable (which is true of virtually every major industry in the United States), it does not matter what form the "eventual statutory scheme" takes, nor does it matter whether the nature or extent of the liability actually imposed was foreseeable; no taking will have occurred. Fed. Br. 19-21. This radical proposition would make it nearly impossible to conduct business in the United States, and it is therefore not surprising that, in fact, the test is not what the Government suggests.

The "investment-backed expectations" inquiry asks whether a burdened party, such as Eastern, had any right to rely on a particular state of the law and to assume that its business decisions would turn out in a particular way, in light of what a reasonable person would have expected or foreseen at the relevant time. *See generally, Concrete Pipe*, 508 U.S. at 645-46. As of 1966, Eastern had restructured its operations precisely because its ability to raise capital depended, in part, on the assurance that Eastern was insulated from coal-related liabilities. In early 1987, Eastern had been out of the coal business for over 20 years, but its independent subsidiary, EACC, was still an active coal mining concern. Assuming Eastern had been prescient enough to consider the impending crisis in the UMWA funds, it might have foreseen that were Congress to intervene to avert this crisis, Eastern, as EACC's parent corporation, could share liability with EACC for the benefits that EACC had promised. But Eastern surely could not have expected that it would have retained that liability after transferring all of EACC's stock to Peabody Holding Co. in 1987. Indeed, Eastern contemplated, and specified to EACC and Peabody

during the negotiations, that "Eastern's coal-related liabilities (known and unknown) would remain with EACC." JA 216-17. Every legal principle Eastern might have relied upon in assessing that issue would have led to the same conclusion.[6]

Had Eastern anticipated federal intervention in some impending funding crisis, Eastern might have wanted to see how Congress was likely to respond. It then would have looked for further guidance to the best "model" available—a statute that courts have called "identical to the character" of the Coal Act, *Blue Diamond*, 79 F.3d at 526—namely, the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). *See generally, Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 724-25 (1984). Had Eastern turned for guidance to the MPPAA to assess how a transaction such as the sale of EACC to Peabody would be treated, it would have found (i) that a parent and a subsidiary are treated as a single employer for purposes of withdrawal liability under the "common control" test of the Employee Retirement Income Security Act of 1974 (ERISA), *see* 29 U.S.C. § 1301(b)(1); and (ii) that the sale of a subsidiary does not constitute a "withdrawal" which triggers withdrawal liability, *see* 29 U.S.C. § 1384(a). Under the approach adopted in the MPPAA, therefore, Eastern would not bear any liability so long as its former subsidiary continues to make contributions required under the statute.

Thus, having examined the MPPAA, Eastern

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[6] Under common law principles of corporate successorship and contract law, EACC assumed all of Eastern's coal-related liabilities by 1966, and the subsequent sale of all of EACC's stock to Peabody would normally transfer all of EACC's liabilities. Those principles, then, would have led Eastern to believe that it would successfully transfer all coal-related liabilities by selling EACC's stock to Peabody.

reasonably would have expected that it would not bear primary liability for coal-related obligations after transferring all of EACC's stock to Peabody. Congress' departure in the Coal Act from the rational scheme contained in the MPPAA, and its disregard of ordinary common law principles regarding corporate successorship, was not foreseeable, and wreaked havoc on the investment-backed expectations that Eastern reasonably held in planning and executing the sale of EACC to Peabody.

Thus, the Coal Act interfered in an unforeseeable manner with Eastern's investment-backed expectations. Because the court of appeals relied so heavily on a distorted view of this critical factor, this Petition presents an opportunity to reject the proposition that a general history of federal involvement in an industry is sufficient to justify virtually any retroactive liability—even an unanticipated liability arising out of conduct that occurred more than a generation ago.

Conclusion

For the additional reasons set forth above, Eastern's Petition for a Writ of Certiorari should be granted.

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